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No. 85-1585

IN THE

Supreme Court of the United States

October Term 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,

Petitioners,

vs.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LAJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J.H. GRANDSTAFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, CITY OF BORGER, TEXAS

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INTEREST OF THE AMICUS CURIAE

The Texas Municipal League is a non-profit association of more than 900 Texas municipalities. Each of its member cities is a political subdivision of the State of Texas. *Amicus curiae* is affected by the holding of the Court of Appeals for the Fifth Circuit in that the opinion greatly expands the potential liability of cities under 42 U.S.C. sec. 1983 for acts of their employees or agents.

Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

On the night of August 10, 1981, while searching for a kidnapping suspect, officers of the City of Borger, Texas, Police Department shot and killed James C. Grandstaff. His widow, child, and step-children sued the officers and

the City of Borger pursuant to 42 U.S.C. sec. 1983. The jury found that "the City of Borger was grossly negligent in failing to properly train its police officers in that serious incompetence or misbehavior was general or widespread throughout the City of Borger police force." *Grandstaff v. City of Borger, Texas,* 767 F.2d 161, 170 (1985). On appeal, the Court of Appeals for the Fifth Circuit found that there was no evidence of prior misconduct within the Borger police force. 767 F.2d 161, 171. The Court of Appeals, however, held that a pre-existing city policy can be inferred from a city's post-event failure to discipline its employees following a single incident of misconduct. 767 F.2d 161, 171.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fifth Circuit erred in holding that a pre-existing city policy can be inferred from a city's post-event failure to discipline its employees after a single incident of misconduct.

ARGUMENT

Respondents brought this suit pursuant to 42 U.S.C. sec. 1983 which provides, *inter alia*, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." A city may be held liable in a sec. 1983 action if an employee causing an injury acts in execution of a policy or custom of the city at the time the injury is inflicted. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

The vicarious liability rule was developed further by This Court in *City of Oklahoma City, Oklahoma v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427 (1985).

In *Tuttle*, the plurality opinion made a distinction between policies and customs that were in and of themselves unconstitutional and policies and customs that were not inherently unconstitutional. ____ U.S. ____, 105 S.Ct. 2427, 2436. After making the distinction, the plurality stated that "Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." ____ U.S. ____, 105 S.Ct. 2427, 2436.

In the case at bar, the Respondents did not allege that the City had adopted an unconstitutional policy. Instead, Respondents contend that the City of Borger is liable because it was grossly negligent in failing to properly train its police officers, resulting in serious incompetence or misbehavior general or widespread throughout the City police force. Under the plurality

opinion in *Tuttle*, therefore, Respondent was required to produce substantial proof of the requisite fault on the part of the municipality, and the causal connection between the policy and the constitutional deprivation.

There was no evidence of prior misconduct within the Borger Police Department and this lack of evidence was noted by the majority in its opinion in the Court of Appeals. 767 F.2d 161, 171. The majority takes note that "Isolated incidences of police misbehavior are inadequate to prove the knowledge and acquiesence by a city policymaker." 767 F.2d 161, 171.

The majority concludes that a policy of the Borger Police Department may be inferred from the fact that following the night in question, there were no reprimands, discharges, or admissions of error. 767 F.2d 161, 171. This post-event failure to discipline the police officers constitutes no evidence of a before-the-fact policy of illegal conduct. Although such failure might be

evidence of a policy commencing from that point in time when no discipline was invoked, it is no evidence of a prior existing policy. *See*, Dissenting Opinion on Petition for Rehearing and Suggestion for Rehearing en banc, *Grandstaff v. The City of Borger, Texas*, ____ F.2d ____, (1985); *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982); *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980), *cert denied*, 449 U.S. 1016 (1980).

The majority opinion in the Court of Appeals relies on *Andersen v. U.S.*, 417 U.S. 211, 94A S.Ct. 2253 (1974) and *McDonald Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), in support of its decision that proof of post-event conduct in a sec. 1983 case is sufficient to uphold a jury finding of a pre-event policy. These cases are inapposite. They show only that motive in a Title VII suit may be shown by subsequent conduct and that criminal conspiracy may be proved by subsequent acts. Neither case addresses the measure of evidence necessary to prove the

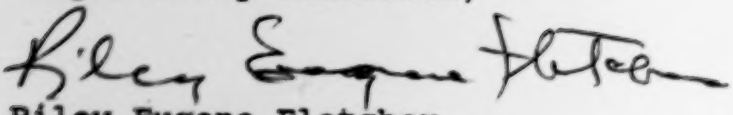
existence of a city policy which is not itself unconstitional. See *City of Oklahoma City, Oklahoma v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427, 2436 (1985).

In summary, Respondents failed to show that the City caused Respondents' damages because it was not shown that there was a city policy within which the police officers were acting. Such a policy cannot be inferred from a City's post-event failure to take disciplinary action in response to a single incident of employee misconduct.

CONCLUSION

For the foregoing reasons, a *writ of certiorari* to the Court of Appeals for the Fifth Circuit should be granted, and, upon hearing thereof, the judgment of the Court of Appeals for the Fifth Circuit should be reversed as to the liability of the City of Borger, Texas.

Respectfully submitted,



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April 30, 1986